ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
The Petition of the State of Minnesota,	)	
Acting by and Through the Minnesota	)	
Department of Transportation and the	)	CC Docket No. 98-1
Minnesota Department of	)	
Administration, for a Declaratory Ruling	)	
Regarding the Effect of Sections 253(a),	)	
(b) and (c) of the Telecommunications	)	
Act of 1996 on an Agreement to Install	)	
Fiber Optic Wholesale Transport	)	
Capacity in State Freeway Rights-of-Way	)	

COMMENTS OF RCN TELECOM SERVICES, INC. ON FEDERAL PREEMPTION OF AN EXCLUSIVE AGREEMENT TO INSTALL FIBER OPTIC WHOLESALE TRANSPORT CAPACITY IN FREEWAY RIGHTS-OF-WAY

SUMMARY

RCN Telecom Services, Inc. ("RCN"), through undersigned counsel and pursuant to the Commission's *Public Notice* (DA 98-32, rel. Jan. 9, 1998), respectfully submits these comments to urge the Commission to reject the petition ("Petition") in the above-captioned proceeding. The State of Minnesota ("State") asks for a declaratory ruling that its agreement ("Agreement") with a team composed of ICS/UCN LLC and Stone & Webster Engineering Corporation (together, "Developer"), which would grant exclusive longitudinal rights-of-way over freeways in the State, does not violate Section 253 of the Communications Act of 1934 ("Act"). RCN affiliates are among the first facilities-based companies to offer a package of competitive local and long-distance telephone, television, and high-speed Internet access to residential and commercial customers over advanced fiber optic networks. As such, RCN has a strong interest in ensuring nondiscriminatory

access to any currently available as well as new rights-of-way. Because the Agreement proposed in this proceeding falls far short, RCN asks that the Commission declare that it is inconsistent with Section 253.

TABLE OF CONTENTS

I. INTRODUCTION

Given the unique opportunity to expand competitive telecommunications services that freeway rights-of-way around the country present, it is surprising that Minnesota has undertaken so little effort to ensure that its freeway rights-of-way will be exploited by a maximum number of providers and in an even-handed manner. Indeed, the terms of the Agreement are antiquated by today's standards that seek to level the playing field for competitors, especially when those

competitors must deal with telecommunications providers who control facilities. The Agreement would prohibit all entities except the Developer from offering telecommunications services over facilities that they own, operate, and maintain, along freeway rights-of-way. In addition, the Agreement would not allow a competitor to buy (or, as the State characterizes it, "collocate") fiber except before Developer begins construction. Extra space would be unavailable later. Thus, the Agreement bans entities from using these rights-of-way to provide service over their own facilities in the future unless their current business plans and financing so allow, and in any case, competitors would be disallowed from accessing, maintaining, or repairing those facilities.

According to the State, even if the Agreement does not satisfy the Commission's standard under § 253 (a) of the Act (because it "materially inhibits or limits the ability of competitors to compete in a fair and balanced legal and regulatory environment")[1], it is a legitimate exercise of state power and rights-of-way management which is both necessary for public safety and competitively neutral (*see* Act §§ 253 (b) and (c)). However, despite the State's claim that the arrangement is competitively neutral because Developer is "contractually restrained to constructing fiber transport capacity for sale or lease on a wholesale basis" (Petition at 14), nothing in the Agreement prohibits the Developer from affiliating with or owning an entity that can offer retail services over Developer's capacity. This loophole renders transparent terms of the Agreement which purport to prohibit price discrimination. There are no other protections against service-related discrimination including selective delay tactics, which could impair CLEC "network availability" commitments. Finally, perhaps because the State gains free transmission capacity for its telecommunications needs,

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[1] Petition at 18 (citations omitted).

it has presented only vague evidence of the Agreement's safety justifications without *any* showing that the requirements it propounds are necessary, much less that the "alternative to single-party access is no access at all." Petition at 8.

Limited-access roadways across the country are ideally situated for telecommunications infrastructure. Unless the Commission enforces the intent of Congress as expressed in §253, states or municipalities will be free to designate such space as off-limits under the pretense of "safety" except as the state or municipality itself deems advantageous and fitting, however unreasonably and with whatever empty rationale. Because Minnesota's Agreement curtails efforts of competitors to provide services, is not competitively neutral, and is over broad in protecting public safety, RCN Telecom Services, Inc. respectfully submits these Comments, which explain why the Commission should deny the State's Petition and preempt the Agreement.

II. COMMENTS

A. The Agreement Materially Inhibits or Limits the Ability of Competitors to Compete in a Fair and Balanced Legal and Regulatory Environment.

1. The Agreement, as described by State, curtails competition

The Agreement would grant the Developer a renewable, ten-year exclusive right of longitudinal access to freeway rights-of-way to provide wholesale fiber optic transport capacity. Petition at 1. At the outset, Developer would lay its own fiber and collocate competitor fiber. However, Developer would not be obligated to "collocate" competitor fiber after construction begins. That is, competitors would be unable to pull new fiber after conduits have been laid, even though this is routinely done industry wide. Further, although competitors would be able to lease capacity, they could not lay or attach their own fiber along the freeways and would be required to

rely on the Developer for repair and maintenance. Thus, the State's proposal is considerably more onerous than a discrete approach to managing rights-of-way, which might include simply coordination of construction or access schedules, determination of insurance, bonding, and indemnity requirements, and the establishment and enforcement of building and attachment codes.

As the State acknowledges, facilities-based entry has been widely recognized as the type of competitive entry offering the best opportunity for significant and meaningful long-term local exchange competition. Petition at 9, 17. Margins are thin when leasing and reselling. Petition at 22. Yet Minnesota reserves the cost advantages of offering service on facilities owned, operated, and maintained by an entity for Developer alone. If willing to sacrifice these advantages, a competitor could collocate fiber if it can successfully negotiate with Developer before August 1, 1998.[2] After that date, the door will be shut and any competitor newly entering the Minnesota market will be relegated to the decidedly less effective option of reselling or leasing. Thus, the Agreement makes effective entry several years down the road, as advantaged by the choice rights-of-way in question, impossible.

2. There are no comparably advantageous alternatives for competitive entry across Minnesota

Minnesota freeway rights-of-way are ideally situated for competitive, facilities-based entry. While acknowledging as much in advocating the Agreement (*see e.g.* Petition at 9, 25), the State would have this Commission believe that viable options are there for the choosing. *See* Petition at 4 ("fiber optic capacity and alternative rights-of-way in the State is so great [that the Agreement cannot have a prohibitive effect]"); Petition at 18 ("entities are free to operate and expand existing

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[2] *See* Petition at 10; Agreement, Exhibit F ("Schedule of Performance").

fiber capacity and to place new fiber in alternative locations."). The availability of alternatives -- and the State's self-serving assessment of same -- have no necessary bearing on how the Agreement by its own terms constrains potential competition. In any case, alternatives are scant.

The State's claim that alternative routes may currently be utilized free of regulation speaks only, of course, to the use of existing *capacity*, not the availability of additional rights-of-way to construct facilities. The State curiously ignores the significant regulatory and other hurdles to utilizing the rights-of-way it suggests (railroads, gas pipelines, oil pipelines, and electric power lines). In particular, the State takes no account of space availability, the necessity and costs of retrenching, coordination of access among competitors, and, of course, the task of negotiating rates and terms with each municipality. Further, despite the State's enumeration of fiber optic networks of a long list of entities, outside urban areas only the facilities of incumbent LECs and AT&T are available for resale. Petition at 21.

Moreover, in its various arguments, the State actually presupposes the distinctive nature of the rights-of-way. For example, the State likens the bidding process used in identifying a developer to a spectrum auction, because such a process "allocates *limited capacity* fairly among competitors." Petition at 31 (emphasis added); *see also* Petition at 5 (rights-of-way at issue are "unique"). Ironically, the State also concedes that "rural areas would otherwise have little or no prospect of being served by alternative sources of fiber." Petition at 9; see also 25. But as the State well knows from its survey of currently available fiber optic capacity, the industry trend is to build competitive facilities in urban areas first. Thus, to the extent a competitor would want to further the goals of universal service by providing rural service over its own network, it is unlikely that it would be ready

to proceed when Developer begins construction. Such a competitor would therefore no longer have an alternative option.[3]

In comparison to other opportunities, the potential benefit of building facilities on the freeway rights of way is clear. This should not be surprising. If the alternatives were so attractive, it is doubtful that any entity would value exclusivity of access.

3. The Agreement allows Developer to exploit the rights-of-way to its own advantage -- not to enhance the competitive environment

The State repeatedly asserts that the proposed use of the rights-of-way will increase competition. Indeed, as prominently argued by the State, there may be a net gain in wholesale transport capacity as a result of the Agreement. Petition at 2-3. However, this does not speak to whether "the competitive environment will be enhanced." (*see* Petition at 4) The paucity of ready -- or even remote -- alternatives underscores the possibility that Developer will be in a unique position to leverage its grant unfairly.

A basic tenet of competition policy (and facet of telecommunications history) is that a sole seller of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. *See generally* 1992 Horizontal Merger Guidelines of the U.S. Department of Justice and Federal Trade Commission ("Merger Guidelines"). Of course, Developer will enjoy a cost advantage over all other wholesale suppliers of telecommunications capacity in the State, but without the competitive pressures to keep prices down. (Its only obligation with regard to prices, supposedly, is to keep them uniform.) For its part, the State attempts to portray

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[3] For this reason, not addressed in the Petition, the State fails to show why the Agreement advances the Universal Services goals of §254 of the Act, as required by §253(b).

a hopping market, concluding without more that the "[r]elevant market affected by the Agreement is the wholesale fiber transport market throughout all of Minnesota." Petition at 20. However, it appears that the market is not necessarily broader than wholesale fiber transport over the freeway rights-of-way in question. Given the advantage of using one's own infrastructure, and the significant obstacles to placing facilities on alternate routes, competitors would not be able to purchase substitute facilities in response to a price increase. *See* Merger Guidelines, §1.11. As Developer would be in a position to enhance market power or facilitate its exercise, it is all the more incumbent on the State to ensure that Developer's conduct is very carefully monitored.

Yet Developer will have a conflict of interest in providing wholesale services on a nondiscriminatory basis. The State's claims at page 4 and 14 of the Petition, that "Developer is a wholesaler of fiber optic transport capacity and will not offer or provide telecommunications service to the general public," and that "Developer is a 'carrier's carrier'" "contractually restrained to constructing . . . transport capacity . . . on a wholesale basis" are misleading at best.[4] Under the Agreement, Developer has the right to affiliate with (or own), and provide services to, a retail

[4] *See also* Petition at 1; contrary to the State's claim, even if the Developer only provides wholesale services, as long as it holds itself out to offer those service to all potential customers, it provides "telecommunications services" under the Act. *See* §§ 3(46), 3(43). In any case, users of the network *would* offer (or be constrained from offering) "telecommunications services."

provider.[5] Agreement, §3.1(b)(vii). Because Developer, through an affiliate, can compete with its other customers, it has a perverse incentive to provide nondiscriminatory service.

Foremost, Developer will be able to discriminate against competitors by varying pricing to its affiliate.[6] Notwithstanding that the State will publish "Developer's customer classifications, rates and charges" (*see* Petition at 11) and Developer would be required to *charge* an affiliate "as it does for similarly situated, unaffiliated, non-interested customers" (*see* Agreement §7.8(c)), the Agreement contains no provision ensuring that a transaction "on the books" does not alter the Developer's (or affiliates') underlying financial incentives. When affiliates price below cost -- any rational economic entity must do so when there is no requirement to maintain separate books, and there is none here -- the Agreement's neutral "cover," as well as any meaningful competition, is blown off the road.

There is an entire menu of additional methods for a carrier that is in control of facilities to discriminate against competitors. The necessity of interconnecting or collocating switching or other equipment always invites complicated questions whereby the entity in control is the arbiter of what arrangements and schedules are feasible. In the context of rights-of-way management that is far less

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[5] An affiliate, or "Company Related Party" is any entity who directly or indirectly owns a 20% or greater interest in the Developer ("substantial owner"); any entity in which a substantial owner owns, directly or indirectly, a 20% interest; "any entity effectively controlled by or controlling" the Developer; or management or owners, or family members of management or owners. Agreement, §2.14.

[6] In fact, the Agreement inexplicably contemplates that the Developer will price differently among customers, including "most favored customers." *See* Agreement, §3.3(d)(iv); *see also* §3.3(d)(ii) and (iii) (Developer "shall . . . deliver to State . . . then existing most favored customer rates and charges."); §3.3(d)(iv) ("State shall have the right to the requested additional capacity . . . at 80% of the Company's most favored customer rates and charges [or] . . . at 80% of the Company's rates and charges for similarly situated customers.")

overreaching than that proposed in the Agreement, RCN has encountered issues such as deliberate delay and revising construction specifications which favors one party over another, as well as disagreements over market value for easements in surrounding municipalities, sharing maintenance costs, and testing facilities. Suffice it to say, such an overarching Agreement is rife with possibilities for conflict and unfair dealing.

These concerns are not mitigated by any mechanism for aggrieved competitor customers to invoke the promise of nondiscriminatory dealing once the Agreement is implemented. Contrary to State's claim that "the Agreement takes all feasible steps to require Developer to fulfill competition-enhancing provisions" (*see* Petition at 19), the Agreement takes woefully inadequate measures in this regard. For instance, there are no provisions to arbitrate deadlocked collocation negotiations. (The Developer has every advantage in biding time and cannot, in any case, be vulnerable to a competitor's [nonexistent] leverage.) Competitors are also unable to invoke the construction guarantees and service standards enumerated in Developer's Operations, Administration, and Maintenance Plan (as described in Agreement, Section 7.3). In addition, neither the competitor nor the State would have the right to monitor any competitor-owned facilities. Agreement §7.5. Moreover, given the State's position that Developer is "performing a function for which the FCC has deemed regulation unnecessary in the absence of market power" (*see* Petition at 14), it is unlikely that competitors could find solace in any regulatory oversight on the part of Minnesota. Rather than being able to take advantage of an established complaints procedure, competitors may be forced to pursue a full-blown proceeding or suit.

4. The Agreement does not satisfy Section 253(a) and is not saved by Sections 253(b) and (c)

Because of its outright limits on future facilities-based entry, the Developer's strong potential to abuse its power in the market, and the other reasons discussed above, the Agreement on the facts alone is disqualified by the standard that the State endorses, because the Agreement "materially inhibits or limits the ability of any competitor to compete in a fair and balanced legal and regulatory environment." *See* Petition at 18. For the same reasons, as well as the fact that the State favors Developer over competitors to provision services, the Agreement is not saved by Sections 253 (b) and (c) of the Act to the extent that they require competitive neutrality. In addition, Act §253(c), which additionally requires management of rights-of-way consistent with the public interest, is not satisfied. Restrictions of the type illustrated above, which tend to constrain potential competition and not protect competitors, raise prices over what they would be absent the restriction and are not in the public interest. The fact that the State has so much to gain from the Agreement (as discussed in II.C, below), significantly calls into question whether the Agreement is an acceptable means for the state to administer its guardianship under Act §253(a).

B. The State Restricts Access under the Pretense of Public Safety, the Basis of Which it Has Not Articulated to Any Degree

Exclusivity is necessary, according to the State, "to limit the number of maintenance and operations contractors under the control of Developer who will have access" to the rights-of-way. Petition at 11. "Each additional utility installation by a different utility increases MnDOT's burden, because maintenance of separate facilities increases the costs associated with freeway construction, maintenance, administration, expansions and relocation." Petition at 8. However, the State offers no correlations between the exclusivity restriction imposed in the Agreement and any legitimate

safety needs. Significantly, the Agreement as it stands *does not allow work anywhere near a paved surface.* *See* Agreement § 4.3(b)(i) ("in no circumstances shall any below ground installations be permitted under the roadway or pavement structure . . . or in the median of any divided highway."). It is thus unclear why access to conduit would ever impinge on traffic or safety.

The State touches on various generic concerns regarding traffic jams, inconvenience, and hazardous conditions. *See* Petition, Exh. 6, ¶ 6 ("placement . . . *can* create safety hazards as more vehicles are required to be on the right-of-way during installation and for maintenance," and "construction in the right-of-way *can* add to . . . congestion and . . . inconvenience")(emphasis added); Petition at 2 ("enormous economic losses from traffic congestion"). Then, in conclusory fashion, the State deems exclusive access to rights of way necessary for public safety. *See* Petition at 28 ("The purpose for granting a right of exclusive access is to protect the safety of the traveling public and transportation workers."); *see also* Petition, Exh. 6, ¶ 8 ("harm . . . of having multiple . . . providers . . .with access to freeway rights-of-way is too significant"); Petition, Exh. 6, ¶ 9 ("close working relationship with a single firm . . . is the most effective means of placing fiber capacity along these rights-of-way while protecting public safety and convenience.")

The myriad of details that the State has *not* explained helps illustrate the unfounded nature of the safety issues. In particular, the State gives no account of:

- how expansive off-road areas are within the rights-of-way, and thus, whether the rights-of-way may be accessed without interfering with *any* traffic;
- why risks here are so unique that the permit process already in place for State Trunk Highway rights-of-way (which includes standards for coning, signing, etc., if necessary at all) is inappropriate (*see* Petition at 6-7, 12, 13);
- why access to the rights-of-way by various competitors, if permitted under clearly delineated circumstances and with advance permission, is different from the

Agreement's allowance for access by multiple contractors of the Developer under the same circumstances (*see* Agreement, §§ 7.4 (a)(ii) ("company may permit access by Company's maintenance and operation contractors"); 5.12(l));

- the extent to which Minnesota's and the Federal Highway Administration's traditional purposes relating to longitudinal access along freeways for installation of utility facilities ("minimize the negative impact of utility maintenance vehicles on traffic flow and traffic safety, minimize obstructions in the rights-of-way and avoid open cuts into roads and rights-of-way that utility lines typically require, and minimize the costs and complexities of future roadway expansion or modification") (*see* Petition at 6), and the "strict conditions" promulgated by the American Association of State Highway Transportation Officials (*see* Petition at 7), would *in any way* be compromised by an alternative arrangement;

- what specific factors prevented the State from considering one contractor for the heavy initial build out of conduit, while allowing at a later time competitors flexible access to huts and pedestals at each node, the practice elsewhere; or

- what specific factors prevented the State from considering a more modest approach to rights-of-way management, including coordination of construction or access schedules, determination of insurance, bonding, and indemnity requirements, and the establishment and enforcement of building and attachment codes.

In summary, the State has not made a case for safety.

C. The Agreement Is Not Necessary in Light of the Purported Public Safety Concerns

Requirements which purport to protect public safety should be reviewed based on whether the requirement is necessary. *See New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum and Order, CC Docket No. 96-470 (rel. Dec. 10, 1996), ¶21. The State instead urges considering whether the requirement is "reasonable." As demonstrated above, the State has failed to explain why exclusivity of access to the rights-of-way has any bearing on public safety and, to the extent it *might*, why much simpler steps cannot satisfy the concerns. There is no safety reason why even multiple competitors could not, through

reasonably controlled circumstances, have a greater role in owning, installing, operating, and maintaining fiber along the rights-of-way.

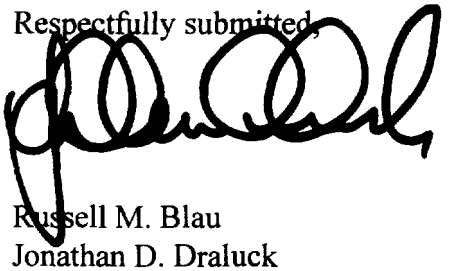
In the face of criticism, the State has rested on its laurels, reminding the Commission that it can veto any use of its highways outright, and concludes that short of the Agreement, the rights-of-way may not be used at all. *See* Petition at 8, 30. Hopefully the State will adopt a different position, because given the sparse basis for invoking safety as an obstacle, as compared to the considerable competitive defects described in these Comments, the Agreement is neither narrowly tailored nor reasonable. As such it must be preempted.

These observations about the State's failure to justify its actions are considerably less remarkable if one considers the State's ulterior motive for advancing the Agreement. It is no surprise that the idea was born in part to reduce the State's telecommunications costs. Petition at 2. In exchange for the grant of exclusivity, Minnesota would have unfettered use of the network for all of its communications needs. Petition at 1, 9. In particular, it reserves capacity, hardware, priority over competitors to the facility space, and ownership of the network in the event of Developer default. These factors have erected a disincentive to consider other plans, including such obvious ones as contracting an entity to lay conduit, and charging users to defray various state costs and expenditures.

III. CONCLUSION

Minnesota acknowledges that the issue it presents is "critical to all large holders of freeway rights-of-way throughout the nation, including state departments of transportation, regional transportation authorities, and turnpike authorities." Petition at 5. Because of the vital role that freeway rights-of-way, heretofore untapped, can play in the telecommunications industry, the Commission ought to raise its guard to states' efforts to exploit their authority selfishly at the expense of competition and the public interest.

Respectfully submitted,



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Dated: March 9, 1998

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 1998, I served copies of Comments of RCN Telecom Services, Inc. On Federal Preemption of an Exclusive Agreement to Install Fiber Optic Wholesale Transport Capacity in Freeway Rights-of-Way, by hand or overnight delivery, on the following:

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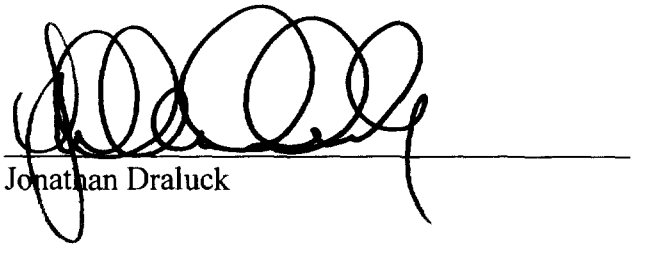

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